No. 89-1806

In the Supreme Court of the United States

OCTOBER TERM, 1990

UNITED STATES ARMY, ET AL., PETITIONERS

v.

SERGEANT PERRY J. WATKINS

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE PETITIONERS

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The government's petition for a writ of certiorari presents three questions: (1) whether the federal government may ever be estopped from applying one of its valid regulations; (2) whether the United States Army may be estopped from applying a valid regulation regarding the minimum qualifications of service members; and (3) whether the Army in this case was guilty of the type of affirmative misconduct that may give rise to estoppel. The government suggested that the petition should be held and disposed of in light of this Court's resolution of *OPM* v. *Richmond*, No. 88-1943, which also presented the first question posed here. The Court has now decided *Richmond*, 110 S. Ct. 2465 (1990), and the government consequently suggests that the Court grant this petition, vacate the court of appeals' judgment, and

remand for further consideration in light of the Court's decision in that case.

In *Richmond*, this Court rejected the notion that "erroneous oral and written advice given by a Government employee to a benefit claimant may give rise to estoppel against the Government, and so entitle the claimant to a monetary payment not otherwise permitted by law." 110 S. Ct. at 2467. The Court "le[ft] for another day whether an estoppel claim could ever succeed against the Government" (*id.* at 2471), but nonetheless broadly held that "judicial use of the equitable doctrine of estoppel cannot grant respondent a monetary remedy that Congress has not authorized" (*id.* at 2472).

This Court's *Richmond* decision does not definitively resolve the questions presented by this case. Nevertheless, the Court's opinion plainly rejects the court of appeals' analysis here. The en banc court held that the United States Army was equitably estopped from applying its reenlistment regulations to respondent, relying on Ninth Circuit precedent holding that "estoppel will be applied against the government" where "justice and fair play require it." Pet. App. 13a-14a (citations and quotation marks omitted). This Court's decision categorically rejects the notion that the government's amenability to equitable estoppel turns simply on the courts' willingness to exercise their equitable powers. The threshold issue, instead, is whether courts "have authority" to estop the government (110 S. Ct. at 2467). Plainly, "courts cannot estop the Constitution" (*id.* at 2476), nor can they "require the Executive Branch to violate a congressional statute" (*id.* at 2477 (White, J., concurring)).

This Court's reasoning in *Richmond* carries even greater force in cases involving military readiness

and discipline. The Court has repeatedly recognized that the judiciary has limited competence and sharply circumscribed authority in military matters. See, *e.g.*, *Chappell* v. *Wallace*, 462 U.S. 296, 300-304 (1983). As we explain in our petition (at 14), *Chappell* denies service members a judicially-created *Bivens* remedy against their superior officers on the ground that the Constitution explicitly gives the Executive and Legislative Branches—and *not* the Judiciary—"plenary control over rights, duties, and responsibilities in the framework of the Military Establishment, including regulations, procedures, and remedies related to military discipline." 462 U.S. at 301. Just as courts have no authority to invoke equitable notions of "justice and fair play" to override congressional spending decisions, they have no authority to override executive and legislative judgments concerning the qualifications of military service members.

Thus, this Court's decision in *Richmond* sheds light on the proper disposition of this case. Although this case, like *Richmond*, presents the question whether a court may ever employ equitable estoppel against the government, here, as in *Richmond*, a "narrower ground of decision is sufficient to address the type of suit presented here" (110 S. Ct. at 2471). We therefore suggest that the court of appeals be given an opportunity to reconsider whether the United States Army may be estopped from applying a valid regulation concerning the qualifications of service members. If the court of appeals adheres to its previous decision, notwithstanding this Court's guidance in *Richmond*, then the issues presented in this petition will be ripe for review by this Court.

For the foregoing reasons and those stated in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted, the judgment of the court of appeals should be vacated, and the case should be remanded for further consideration.

Respectfully submitted.

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